75-1401

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

PAUL LEE SWEENY, *Petitioner*

v.

FRANCIS D. LENTINI,
LAWRENCE R. KEENAN, and
GLEN SHENK
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether pretrial summary judgment can be granted finally dismissing petitioner's complaint for damages, by a District Judge who did not hear oral argument on the pretrial motion and after the motion had been argued before a different District Judge.

2. Whether a county assistant prosecutor is immune from suit for damages under Title 42, Section 1985 (3) U.S.C. for conspiring to and intentionally depriving petitioner of his Fifth and Fourteenth Amendment Constitutional rights by wilfully, intentionally and maliciously concealing from the court the fact that petitioner had previously been twice acquitted of the same charge after jeopardy attached, thereby concealing exculpatory evidence from the court, and where, prior to and during the third trial, the said prosecutor intentionally mislead the court by falsely stating, inter alia, that the two previous prosecutions of petitioner were for different offenses from that involved in the third trial.

3. Is a county magistrate immune from an action for damages under Title 42, Section 1985 (3), U.S.C., where he intentionally issued a third criminal process against petitioner for the same offense with knowledge that petitioner had twice previously been tried and acquitted of the same offense after jeopardy attached, thereby conspiring to deprive petitioner of his Fifth and Fourteenth Amendment Constitutional rights.

4. Is "good faith" an absolute defense to a Title 42, Sections 1983 and 1985 (3) action for damages against a county official, there being no evidence to support such defense.

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CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT V.

* * * Double Jeopardy; * * *

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV.

* * * Privileges and immunities; Due Process; Equal protection. * * *

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 42:

Section 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage of any Sta-

te or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1985. Conspiracy to interfere with civil rights - * * *

Depriving persons of rights or privileges. (3) If two or more persons in any state or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators. R.S. Section 1980.

STATEMENT OF THE CASE

On December 20, 1973, respondent Francis D. Lentini, in his capacity as Chief of Housing and Licensing of Fairfax County, Virginia, swore to a criminal complaint charging petitioner with violating Section 1309.1 of the Fairfax County Build-

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ing Code Ordinance on or about December 8, 1973. Said criminal complaint read as follows, in pertinent part:

> " * * * that he (petitioner) has a demolished structure on * * * 9601 Saintsbury Drive (in Fairfax County), and such vacant, hazardous structure has not been filled, graded or maintained at the established street grades at curb level and that the aforesaid lot contains rubbish and further is unsafe and hazardous to the life or health of the public."

On February 19, 1974, after a trial during which three witnesses testified and jeopardy attached, the Fairfax County General District Court, not a court of record, dismissed the aforesaid charge and acquitted petitioner.

On March 1, 1974 respondent Lentini, acting in the same capacity as on December 20, 1973, again swore to a criminal complaint charging petitioner with violating the same Section 1309.1 of the Fairfax County Building Code Ordinance on March 1, 1974. The second criminal complaint against petitioner read as follows, in pertinent part:

> " * * * that Paul Lee Sweeny * * * did, in the County aforesaid, on or about the 1st day of March, 1974, unlawfully, in violation of County Ordinance, Section 1309.1 of the Virginia Uniform Statewide Building Code (identical with Fairfax County Ordinance) allow the building which has been torn down to remain at 9601 Saintsbury Drive, Fairfax County; said remains are a hazard to public safety and therefore, a violation of said code."

On April 30, 1974, the second charge against petitioner was dismissed by a different Judge of the General District Court of Fairfax County, Virginia after jeopardy attached. The same witnesses who testified at the first trial again testified at the second trial and gave substantially the same testimony

they gave at the February 19, 1974 trial. The second prosecution of petitioner by respondent Lentini involved the same condition of the same property that were involved in the first trial.

On August 2, 1974, respondent Lentini, still acting in the aforesaid capacity, for the third time swore to a criminal complaint against petitioner charging him with violating the same Section 1309.1 of the Fairfax County Building Code Ordinance on July 19, 1974. The third criminal complaint against petitioner read as follows, in pertinent part:

> " * * * that Paul Lee Sweeny * * * did, in the County aforesaid, on or about the 19th day of July, 1974, unlawfully, in violation of County Ordinance, Section 1309.1 of the Fairfax County Building Code * * * in that he has a demolished structure on Parcel 91, Map 48-1, known as 9601 Saintsbury Drive (Fairfax County) and such vacant hazardous structure has not been filled, graded or maintained at the established street grades at curb level and that the aforesaid lot contains rubbish and further is unsafe and hazardous to the life or health of the public."

On October 3, 1974, still another Judge of the Fairfax County General District Court dismissed the third charge thus brought against Petitioner after jeopardy had attached. The witnesses present and prepared to testify at the third trial had testified at the first two trials.

All three criminal prosecutions thusly instituted by respondent Lentini against petitioner involved the same condition of the same property. There was no difference in the testimony actually given at the first two trials, and the testimony that would have been given at the third trial. The first and third criminal complaints sworn to by respondent Lentini against petitioner were word for word identical, and the second of the three criminal complaints was in all pertinent aspects, identical with the other two, except for dates.

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Subsequently, respondent Lentini testified on deposition that he was studying the County Code to see if he could find another section of the Code under which he could bring more prosecutions against petitioner for the same condition of the same property.

The instant civil action was filed by petitioner against respondents in the District Court on September 20, 1974. The first Count of this civil action alleged a conspiracy among all respondents to violate petitioner's civil rights in violation of Section 1985 (3) of Title 42, U.S.C. and the Fifth and Fourteenth Amendments to the Constitution of the United States, for having placed petitioner in jeopardy three times for the same offense. The second count of this civil action charged respondent Lentini with a direct violation of petitioner's right protected by Title 42, Section 1983, U.S.C., and the Fifth and Fourteenth Amendments to the Constitution of the United States not to be subject for the same offense to be twice put in jeopardy.

Petitioner filed timely motions in the Fairfax County General District Court to dismiss the second and third criminal prosecutions on the grounds of Double Jeopardy and collateral estoppel.

The specific allegations made against defendants Shenk and Keenan are found in paragraphs 11-14, inclusive, on page 4 of petitioner's complaint and allege as follows:

> "11. The defendant Shenk, at the behest of the defendant Lentini, has wrongfully, maliciously, and without probable cause, issued a third criminal summons against plaintiff, for the same alleged violation hereinbefore mentioned (Section 1309.1 of the Building Code) and which has heretofore been twice dismissed by the said court, whereby plaintiff would be required to defend himself for a third time against the aforesaid wrongful allegations of the defendant Lentini, after he, the said defendant Shenk had been informed

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that the two previous criminal charges had been dismissed by the court. (parenthetical matter added).

"12. The defendant Keenan, at the behest of the defendant Lentini, has falsely and maliciously made false representations to the aforesaid General District Court of Fairfax County, Virginia, and has maliciously slandered plaintiff's aforesaid property known as 9601 Saintsbury Road, Fairfax, Virginia.

"13. And the defendant Keenan has wrongfully and maliciously advised, counselled, encouraged, aided and abetted the defendant Lentini to continue his reckless and unlawful course of conduct against plaintiff designed to harass and intimidate plaintiff by continually swearing to criminal charges against plaintiff, in an attempt to force plaintiff to remove certain building and other materials now stored on plaintiff's said land.

"14. That the defendant Keenan has wilfully, wantonly and maliciously falsely represented to the General District Court of Fairfax County, Virginia, as follows:

(a) Falsely stated to said court that the two previous trials of the same charge now pending before said court were "zoning cases" and therefore were not the same issue as is involved in the pending case;

(b) Falsely stated to said court neither of the two previous trials had been trials on the merits;

(c) Slandered plaintiff's aforesaid property maliciously; (Page 5 of the Complaint);

(d) Falsely stated that the first charge against plaintiff had been dismissed by the court on February 19, 1974, because of the lack of a search warrant;

(e) Wrongfully suppressed the facts and circumstances surrounding the first trial on

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February 19, 1974 and the second trial on April 30, 1974, involving the same identical issue as is involved in the criminal charge now pending against plaintiff."

Although respondents Keenan and Shenk each filed an affidavit in the District Court in support of their respective motion for summary judgment, there was no denial of the aforesaid allegations under oath.

Respondent Keenan filed a motion to dismiss in the District Court on the grounds the complaint failed to state a cause of action against him. After hearing oral argument on the motion, District Judge Lewis denied the same.

Thereafter, all defendants filed motions for summary judgment, with affidavits in support thereof, as did the petitioner, and all parties requested hearings on their respective motions. The motions came on for argument on February 15, 1975, before District Judge Lewis who took the same under advisement. Before Judge Lewis could rule on the motions for summary judgment, the instant case came on for trial before District Judge Bryan, Jr., and the following occurred in Chambers prior to the Trial:

"The Court: I want to announce to you my ruling on motion for summary judgment. I understood Judge Lewis had heard argument on it. So I am going to rule on it.

"Mr. Sullivan (counsel for petitioner): Without argument?

"The Court: Yes, sir. I read the briefs, and I see no reason for further argument.

"I think the assistant Commonwealth Attorney whose name is --

"Mr. Sullivan: Keenan.

"The Court: --Keenan should be dismissed because he is immune. The allegation is with regard to him in my view have to do with his performance of duties that are part of

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the judicial process. I am unwilling to follow the Hilliard case that the Fourth Circuit discussed in the Ebert decision. They do not follow it and say no occasion to decide whether they should follow it.

"But on the basis of both the Wethers (sic) v. Ebert case and the McRay (sic) v. Maryland case I find that Keenan is immune. Therefore, for failure to state a cause of action insofar as damages are concerned he will be dismissed from the case and that does not dismiss him from the case insofar as injunctive relief is concerned, however, but since the only thing that is going to the jury this morning is the question of damages he will be dismissed from that portion of the suit.

"Likewise, Shenk is immune. His duties in determining whether or not to issue an arrest warrant are in my view both quasi-judicial and discretionary, and I think that he, under the McRay case, is immune for any suit for damages. Accordingly, he will be dismissed from the case, insofar as the request for damages are concerned.

"That leaves, of course, Lentini. The motion for summary judgement will be denied as to Lentini."

A jury was thereupon empanelled and upon the conclusion of the plaintiff's evidence the following occurred:

"The Court: Mr. Sullivan, tell me what is the constitutional deprivation of which you complain.

"Mr. Sullivan (counsel for petitioner): The constitutional deprivation of which I and my client complain is that he has three times been put in jeopardy for the same occurrence.

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"The Court: It is a violation of the Fifth Amendment prohibition against double jeopardy?

"Mr. Sullivan: Yes, sir.

"The Court: Is that it?

"Mr. Sullivan: That's it.

• • • • • •

"The Court: In view of the narrow issue presented to the Court, which is that there is a violation of 42 U.S.C. S 1983 consisting solely of the plaintiff here being placed in jeopardy more than once for the same offense in violation of the Fifth Amendment, I think the motion of the defendant must be granted.

"I don't want to throw the plaintiff out on a technicality, and he may have a malicious prosecution suit in the State Court. He expressly disclaims, however, any intent to assert that claim here, or to assert any claim except the constitutional deprivation, a constitutional deprivation which is limited to a violation of the Fifth Amendment right not to be placed in jeopardy more than once for the same offense.

• • • • • •

"Mr. Symanski: We will represent that Mr. Lentini will not proceed under 1309.1 under the same set of facts and the same property.

"The Court: Against Mr. Sweeny?

"Mr. Symanski: Right.

"The Court: All right. That strengthens my determination that the injunction should be denied, and for the reasons I have said, based on the evidence I have heard here this morning, ---

"Mr. Sullivan: Your Honor, may I ask to get in the record --

"The Court: - - will be denied.

"Mr. Sullivan: - - in the records that this is the same factual situation on all three things, and that is the basis and the fact. I want that just in case we desire to pursue it further.

* * * * * *

"The Court: **********

"He may have been wronged, but his only basis for federal jurisdiction, that is having a suit in federal court, is to show a violation of a constitutional right.

* * * * * *

"Any suit he may have must be brought elsewhere and not in federal court. * * * *"

The granting of Summary Judgment by District Judge Bryan, Jr., in favor of respondent Keenan and Shenk, without a hearing was ignored by the Fourth Circuit although the matter was dicussed extensively by petitioner in that Court. The opinion and judgment of the Fourth Circuit, therefore, affirmed District Judge Bryan, Jr.'s, pre-trial grant of Summary Judgment in favor of respondents Keenan and Shenk and operated as a final dismissal of petitioner's complaint against said respondents without petitioner ever having a hearing on the matter.

The opinion and judgment of the Fourth Circuit upheld the action of the District Court in taking the case away from the jury and dismissing the complaint against respondent, Lentini. The Fourth Circuit, without evidence, assigned as reason for its affirmance that respondent Lentini had acted in good faith in bringing three criminal prosecutions against petitioner for the same fact situation, and refused to allow the jury to decide the factual question of good faith. Respondent Lentini put on no evidence at all, and petitioner's evidence certainly did not show good faith on the part of respondent Lentini.

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REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF RULE 56, FEDERAL RULES OF CIVIL PROCEDURE, AND WITH THE PROVISIONS OF RULE 56 ITSELF.

RULE 56

SUMMARY JUDGMENT

(c) Motion and proceedings thereon. The Motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. * * *

(d) * * *(T)he Court at the hearing of the Motion * * *.

The plain language of Rule 56, Federal Rules of Civil Procedure, itself provides for a hearing on a motion for summary judgment. This obviously presupposes a hearing before the judge who is to rule on the motion.

It has been squarely held, by the Ninth Circuit and by the Seventh Circuit that, since the granting of a motion for summary judgment disposes of the action on the merits, with prejudice, a District Court may not, by rule or otherwise, preclude a party from requesting oral argument nor deny such a request when made by a party opposing the motion unless the motion for summary judgment is denied.

In Brown v. Quinlan, (7 Cir. 1943) 138 F.2d 228, the Seventh Circuit held it was reversible error to grant a motion for summary judgment finally disposing of the cause without final hearing, the Court saying:

> "To effect an involuntary termination of a suit requires, in the absence of waiver of final hearing, a hearing upon a motion for summary judgment or to dismiss the complaint. No such hearing was had. The complaint on its face was sufficient and it was error, therefore, finally to dispose of the cause without final hearing."

In the case at bar, respondent Keenan's motion to dismiss petitioner's complaint was denied by District Judge Lewis, thereby establishing the sufficiency of petitioner's complaint, on its face, as to respondent Keenan.

The Ninth Circuit has held it is reversible error for a District Judge to grant a motion for summary judgment without hearing oral argument. Precisely in point, and squarely so holding is Dredge Corporation v. Penny (9 Cir. 1964) 338 F.2d 456, 460-462, where the Court said:

> "* * * The Dredge Corporation argues that the District Court erred in acting upon the motions for summary judgment without first hearing oral argument.
>
> * * * * * *
>
> "Rule 56, Federal Rules of Civil Procedure, providing for summary judgment, appears to contemplate that a hearing will be had before such a motion is acted upon. Rule 56 provides that the motion '* * * shall be served at least 10 days before the time fixed for the hearing.' It is further provided in that paragraph of the rule that the adverse party '* * * prior to the day of hearing may serve opposing affidavits.'
>
> * * * * * *
>
> "* * * In view of the language of Rule 56 (c) and having in mind that the granting of such a motion disposes of the action on the merits, with prejudice, a district court may not, by rule or otherwise, preclude a party from requesting oral argument, nor deny such a request when made by a party opposing the motion unless the motion for summary judgment is denied. See Brown v. Quinlan, 7 Cir. 138 F.2d 228, 229.
>
> * * * * * *

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"The failure to permit oral argument on the motions for summary judgment requires that the judgments be reversed and the causes be remanded for further proceedings."

The opinion and judgment of the Fourth Circuit in the instant case affirming the granting of summary judgment by District Judge Bryan, Jr., which disposed of the action on the merits, with prejudice, without permitting oral argument on the motions, is in conflict with the rule in the Seventh and Ninth Circuits.

These conflicts justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW, HOLDING THAT A PROSECUTOR INTENTIONALLY CONCEALING EXCULPATORY EVIDENCE FROM THE COURT IS IMMUNE FROM AN ACTION FOR DAMAGES CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

In Hilliard v. Williams, 465 F.2d 1212 (6 Cir. 1972), the Sixth Circuit denied immunity to a prosecutor charged with the deliberate suppression of an FBI laboratory report that established the innocence of the defendant, on the grounds that since it is a prosecutor's duty to protect the innocent as well as to convict the guilty, his discretion does not extend to seeking the conviction of a person he knows to be innocent. In the case at bar, prosecutor Keenan knew about the first two trials in both of which petitioner was acquitted. He therefore had information which he knew exculpated petitioner and he intentionally concealed it from the court.

In an earlier case, Weathers v. Ebert, 505 F.2d 514, the Fourth Circuit recognized that the rule announced by the Sixth Circuit in Hilliard (supra)

"represents a real, but very limited departure from the traditional rule of prosecutorial immunity. The complaint charged an intentional abuse of the prosecuting function which resulted in a denial of due process" (page 516 of 505 F2d)

but, in the case at bar, the Fourth Circuit refused to follow Hilliard.

Here, the prosecutor (respondent Keenan) not only intentionally concealed from the General District Court of Fairfax County, Virginia, a court not of record, the fact that petitioner had twice previously been placed in jeopardy on the same criminal charge, and twice acquitted, but he falsely stated to said court that the two previous trials were "zoning cases", which they were not; falsely stated to said court that neither of the two previous trials were on the merits, whereas both trials were on the merits; and falsely stated to said court that the first charge against petitioner was dismissed for lack of a search warrant, whereas in fact it was dismissed because the prosecution's evidence was not sufficient to convict.

The Eighth Circuit has held that prosecutors who act outside the scope of their jurisdiction still have available the defense of good faith and probable cause. Wilhelm v. Turner, 431 F.2d 177 (8 Cir. 1970), cert. denied 401 U.S. 947, 91 S.Ct. 919, 28 L.Ed. 2d 230 (1971). But it was held in Haaf v. Grams (U.S.D.C.D. Minn., Fourth Division, 1973) 355 F. Supp. 542, that the defense (good faith) itself raises questions of fact which may not be determined without hearing evidence, and the court denied the prosecutor's motion for dismissal on the basis of prosecutorial immunity, just as District Judge Lewis did in the case at bar. District Judge Bryan, Jr., however, later granted the prosecutor's motion for dismissal on the basis of prosecutorial immunity without hearing evidence and without a hearing of any kind, and the Fourth Circuit affirmed.

In Hampton v. City of Chicago, et al., (7 Cir. 1973) 484 F.2d 602, 609, the Seventh Circuit held that prosecuting attorneys may be held liable in damages under Title 42, Sections 1983 and 1985 (3) for conspiracy to cause false arrest and

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imprisonment of plaintiffs, the institution of an unfounded prosecution, and the concealment of the truth.

This Court has not had occasion to rule on the question of immunity from damages based upon the performance of duties that are a part of the judicial process, except as to judges, whether they be prosecutorial or quasi-judicial as in the case of respondent Shenk.

Title 42, Sections 1983 and 1985 (3) apply to "every person" and to "two or more persons". Those sections do not contain any exceptions in favor of prosecutors or magistrates and no judicial gloss should be engrafted on them to render such officers immune from damages for their intentional wrongdoing. To the extent those officers acted outside the scope of their duties they should be held liable to petitioner in damages.

The conflict between the Fourth Circuit opinion in the case at bar and the decisions of the Sixth, Seventh and Eighth Circuits justifies the grant of certiorari to review the judgment below.

3. THE FOURTH CIRCUIT, IN AFFIRMING, SAID RESPONDENT LENTINI ACTED "IN GOOD FAITH", AND CITED PIERSON v. RAY, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967).

Pierson v. Ray, supra, did hold that good faith and probable cause was a bar to recovery against police officers for unlawful arrest under Section 1983 of Title 42. The defense, however, must be asserted and then proven at a trial on the merits, as was in fact done in Pierson, and good faith certainly cannot be determined upon motion for directed verdict at the close of plaintiff's case. Respondent Lentini put on no evidence at all at the trial. His pretrial deposition was not in evidence. Petitioner's evidence showed many instances of bad faith on Lentini's part in prosecuting petitioner three times for the same offense, including Lentini's statement on

deposition, after petitioner had been acquitted three times, that he (respondent Lentini) continued to prosecute petitioner because he had been told that in case he ever won a case and got a conviction, he could then prosecute petitioner again every day for the same offense; and that after petitioner's third acquittal of the same charge, he (Lentini) was reading the building code to try and find yet another section under which to prosecute petitioner for the same condition of the same property. The action of the Trial Court denied petitioner his right to a trial by jury on the question of Lentini's good faith.

4. THE DECISION BELOW RUNS CONTRARY TO DECISIONS OF THIS COURT HOLDING THAT THE DOUBLE JEOPARDY CLAUSE INCLUDES COLLATERAL ESTOPPEL.

ASHE v. SWENSON, 397 U.S. 436, 25 L. Ed. 2d 469 90 S.Ct. 1189 (1970) holds that collateral estoppel is a part of the Fifth Amendment's guarantee against Double Jeopardy, and protects a person who has been acquitted from having to "run the gantlet" a second time.

Applying the rationale of Ashe, supra, to the facts of the case at bar, it appears that the pleadings in all three prosecutions here involved are the same (the charges), the evidence adduced in each of the three trials was the same (the third trial was decided on stipulations), and that every possible issue involved in the second and third trials was decided adversely to the contention of the prosecution by the general verdict of not guilty in the first trial. The second trial was nothing but a re-run of the first trial. And the third trial, upon the stipulations, was likewise a re-run of the first and second trials. Both the petitioner and the prosecution witness Hill, a county sanitarian, testified that the evidence at the first and second trials was the same, and that had testimony been given at the third trial, that would likewise have been the same.

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There cannot be any doubt but that petitioner was put in jeopardy in all three trials for alleged violation of section 1309.1 of the building code ordinance. In Breed v. Jones, (decided May 27, 1975), 421 U.S. 519, 95 S.Ct. 1779, ____ L.Ed.2d____, this Court held that prosecution of a state prisoner as an adult in California Superior Court after an adjudicatory finding in juvenile court, violated his constitutional protection against Double Jeopardy, the Court saying (pages 1785 and 1787 of 95 S.Ct.) that "jeopardy attached * * * when the juvenile court, as the trier of the facts, began to hear evidence."

Accordingly, when Judge Whitestone, on February 19, 1974, began to hear evidence in petitioner's trial in the General District Court of Fairfax County, Virginia, petitioner was placed in jeopardy. Jeopardy having attached, petitioner could not constitutionally be again tried in any case involving the same issues. Said trial, at which the prosecution adduced the testimony of three witnesses in an attempt to convict petitioner of violating section 1309.1 of the building code ordinance, adjudicated that petitioner was not guilty of the charge, including all issues involved therein. Said trial was an adjudicatory hearing at which petitioner was put in jeopardy.

Multiple prosecutions based on the same condition of the same property cannot be permitted on the theory that said condition is a continuing offense, for many reasons. Firstly, the trial of February 19, 1974, determined that the condition of petitioner's property was not an offense. There being no offense, the same condition of the same property cannot be a continuing offense. Two times zero is still zero and three times zero is likewise still zero. Secondly, based on the uncontradicted evidence, petitioner did not maintain his property in a way so as to be hazardous to the public generally. The only basis for interference with petitioner's property right to use his property

as he sees fit, is the police power of the state. There was never a citizen complaint, and only respondent Lentini complained. The only person residing near it said it was not dangerous and the county health sanitarian said there was only the potential for danger, which can be said about any property. The trial on February 19, 1974, determined there was no condition on petitioner's property dangerous to life or the health of the public.

The District Court should have enjoyed respondents from prosecuting petitioner in the future based on any charge involving the same condition of the same property. The District Judge recognized that respondents could not again prosecute petitioner for alleged violation of section 1309.1 of the building code. In this, however, he did not go far enough because he failed to apply the doctrine of collateral estoppel. He left the door open to respondents to prosecute petitioner in the future under other section of the code or county ordinances, even though such prosecution may be for the same condition of the same property involved in all three prior prosecutions. This is clearly a threatened further violation of petitioner's constitutional rights as hereinbefore discussed. The February 19, 1974 trial was an adjudicatory hearing and adjudicated all issues involved in that trial. This includes the fact that petitioner's property was not in violation of any law. Unless prevented from doing so, respondent Lentini, who has said he is still looking for other sections of the building code to prosecute petitioner under, based on the same condition of the said property, and perhaps others acting in concert with him, will institute endless prosecutions against petitioner for the same condition of the same property in an illegal attempt to harass petitioner into doing what he says petitioner must do, even after three judges of the General District Court of Fairfax County, Virginia

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have said petitioner is not required to do what said respondent is demanding. The cases holding that Federal Courts have power to grant injunctive relief against such outrageous deprivation of constitutional rights as petitioner has been subjected to are legion, and Mitchum v. Foster, 407 U.S., 225, 32 L. Ed 2d 705, 92 S.Ct. 2151 (1972) held that Title 42, Sections 1983 and 1985 are "expressly authorized" exceptions to the federal anti-injunction statute.

District Judge Bryan, Jr., acknowledged that petitioner may have been wronged and that he may have a cause of action elsewhere, but not in federal court. Monroe et al. v. Pape et. al., 365 U.S. 186, 81 S.Ct. 473 (1961) held that it is wholly immaterial that the State has a law, which, if enforced would give relief. The federal remedy is supplementary to the state remedy and the latter need not be first sought and refused before the federal remedy is invoked.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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April 2, 1976

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1674

Paul Lee Sweeny, Appellant,

-v-

Francis D. Lentini,
Lawrence R. Keenan, and
Glen Shenk, Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued December 3, 1975. Decided Jan. 6, 1976

Before BUTZNER and FIELD, Circuit Judges, and THOMSEN, Senior District Judge.

Charles B. Sullivan, Jr. and Paul Lee Sweeny, appellant pro se, for apellant; John J. Brandt, Robert Flinn (John K. Coleman, George A. Symanski, Jr.; Slenker, Brandt, Jennings & O'Neal, on brief) for appellees.

BLEED THROUGH

PER CURIAM:

Paul Lee Sweeny appeals from an order of the district court dismissing a civil action which he brought under 42 U.S.C. S 1983 against a state magistrate, prosecuting attorney, and zoning officer. We agree with the district judge that these officials did not prosecute Sweeny in violation of his right to be free from double jeopardy under the fifth and fourteenth amendments. Moreover, the magistrate is immune from civil liability for issuing the warrants. Pierson v. Ray, 386 U.S. 547 (1967). The prosecuting attorney under the facts of this case is protected by quasi-immunity. Weathers v. Ebert, 505 F.2d 514 (4th Cir. 1974). The zoning officer at all times acted in good faith pursuant to directions of the prosecuting attorney's office. He was, we believe, entitled to the qualified immunity of a police officer who acts in good faith. Pierson v. Ray, 386 U.S. 547, 557 (1967).

AFFIRMED